United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

ORIGINAL
WITH PROOF
OF SERVICE

76-1418

UNITED STATES COURT OF APPEALS

for the

SECOND CIRCUIT

B P/S

UNITED STATES OF AMERICA,

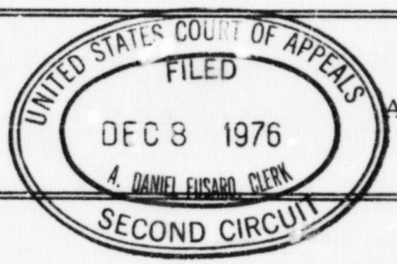
Plaintiff-Appellee,

v.

EDMUND WOLK,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK



APPELLANT'S BRIEF

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STATEMENT OF ISSUES

1. Did the trial judge prejudice the defendant by implying to the jury that only by convicting the defendant could the government collect the tax due?

2. Did the trial judge err when he failed to charge the distinction between civil and criminal liability for failure to file tax returns?

3. Did the trial judge properly define the meaning of "willfulness" when he failed to charge in substance that either a "bad purpose" or "evil motive" was required?

4. Did the trial judge properly define the meaning of "willfulness" when he failed to charge that "negligence" did not constitute "willfulness?"

5. Did the trial judge prejudice the defendant when he agreed t charge "evil motive or purpose" and then refused to do so after defendant's counsel had already given his summation?

6. Did the trial judge err when he permitted the government to introduce evidence concerning defendant's subsequent tax returns filed after the defendant was already being investigated by the special agents?

7. Did the trial judge err when he refused to permit the defendant to introduce documentary evidence to explain

away an error defendant had made when placing the wrong number on his subsequent tax returns?

8. Did the trial judge err in permitting the government to introduce defendant's bank statements into evidence when the government offered no proof to show that all of the deposits in such statements consisted of income?

9. Did the trial judge err in refusing to permit the defendant to introduce into evidence his separation agreement executed in 1972 which would show that defendant lacked a bad purpose and did intend to file his tax returns?

PRELIMINARY STATEMENT

The defendant was charged by information with willfully failing to file income tax returns for the calendar years 1969, 1970, 1971 and 1972 under Section 7203 of the Internal Revenue Code. The trial was held on July 7th, 8th and 9th before The Honorable DUDLEY B. BONSAL, District Judge, and a jury. At trial the defendant was represented by counsel.* On July 9, 1976, the defendant was found guilty of all four counts.

On August 30, 1976, the defendant was fined the sum of $8000 and placed on probation for a two-year period.

This is an appeal from the judgment of conviction and sentence.

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* This brief has been written by the defendant, pro se.

STATEMENT OF FACTS

The defendant is an attorney-at-law who maintains offices at 25 West 43rd Street, New York, New York, and resides at 3850 Hudson Manor Terrace, Riverdale, New York. He has two children, Michael (born July 17, 1966) and Jason (born February 16, 1970), both of whom have resided solely with the defendant since July, 1972. Defendant separated from his wife in July, 1972, and has custody of the two infant children.

At the trial, the government established that the defendant earned in excess of $1200 per year and thus was required to file tax returns. The defendant admitted that he had not filed tax returns for the four years covered by the information (1969, 1970, 1971 and 1972).

The sole issue at trial was whether the defendant "willfully" failed to file his tax returns. The defendant contended that although his failure to file may have been negligent, he possessed neither the bad motive or evil purpose to violate Section 7203 of the Internal Revenue Code.

The proof adduced at trial clearly revealed that the defendant had been in law practice with Bernard West under the firm name of West & Wolk, and that in the Spring of 1968 Mr. West left the law firm to enter the real estate business.

Mr. West testified that until the time that the partnership was terminated, he had been the office administrator and that Mr. Wolk was the worst administrator possible.* Thereafter the defendant was required to handle all phases of the practice, including administrative duties, himself. After Mr. West left, the books and records were in disarray.**

The defendant testified (and his testimony was supported by outside witnesses, to wit, Julius Mager, Ira Zankel, S. Sherman Steinberg) that although his marriage was never really a good one, the marriage deteriorated substantially after his second son, Jason, was born on February 16, 1970. The defendant graphically described

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* On page A12 of the Appendix, Mr. West, in response to a question regarding defendant as an administrator, testified:
"He wasn't an administrator. He was, if anything, the worst administrator of paper work."

** At page A44 of the Appendix, defendant testified:

"After that the books were in disarray. I would sometimes not even enter the checks. I would write a check, I wouldn't enter it in the checkbook. I didn't reconcile the bank statements when they would come in. I didn't have records.

"Subsequently, when I was dealing with Mr. Cappacio and trying to get him the records so we could make up the returns for that period of time, there were whole periods of time I didn't have checks or bank statements. He was able to get back statements for me from the banks, but I didn't have the checks."

his home life after February 16, 1970 at pages A34 to 40 of the Appendix.*

---

* "A. ... It was a tolerable marriage at best, realistically, but in 1970 my second son, Jason, was born in February and my wife began to have extreme difficulties in her actions at that time, and was very depressed.

At first I thought it was a post --

THE COURT: Not what you thought.

A. She was very depressed at that time. She then soon thereafter started to go to psychiatrists and seek psychiatric help.

After that, as the time progressed, we used to have fights once in a while, arguments like most married couples I would assume, but after 1970 they started to increase not only in how often they were, but they were starting to -- they were coming much more often -- they would last longer, and the degrees would become much, much longer.

So that after a while I started to go, when I would get into a fight at some time with her, and the fights would sometimes start in the middle of the night, I would just leave the office -- I would leave the house, rather, and I would go to the office to get some sleep, get some rest because she just wouldn't end the fights.

I'm not saying who was right and who was wrong on the fights, because sometimes we each of us were wrong on the fights. But, that started.

Then they kept continuing in such intensity at some stage, at some stage it got to such a point that there were police being called to the apartment. I was arrested once in October of 1971. The police were at the apartment numerous times.

I would try and stay out of the apartment to come home at 1:00 o'clock in the morning and walk into the apartment at that time on a Saturday night, and I would sleep in the

* (Cont'd.)

office on Saturday evening so I could come home late and not get into a fight, and the fights would start and the cops would come and my children would get up, and particularly the older one and see the cops in the house at the particular time.

I would come home at night during this period of time and very often the door would be locked to the apartment.

THE COURT: Where was this apartment?

THE WITNESS: This apartment was in Manhattan, at 401 East 65th Street.

At this time I was also sleeping for a good part of the time, for about six or seven months before I left, I had taken the mattress out of the bedroom, it was a double bed with one headboard, and I had taken the mattress and physically put it on the floor in the living room, and I was trying to sleep there.

When I would get into fights with her I would say, let me go in one room, you stay in another room. Wherever you want to be I will go some place else to end the fight on this. But she would lock me out of the place, I would have to go out into the street, about 12 blocks away there's a building at 53rd Street, I knew the superintendent, I would borrow the hacksaw to get back into the apartment.

I'd come back to the apartment, I called the police, get some cops on the street to come upstairs with me so I could physically get back into the apartment.

When the cops were there she would then let me into the place. And I would bring the hacksaw downstairs and the cops would wait until I could get back physically into the apartment.

I had to remain during this period of time. I had two small children that I had brought into this world. She couldn't take care of them. She loved the children. She just couldn't spend -- devote what she knew. She came from a broken home herself. Her mother had walked out on the family when she was in her early teens.

THE COURT: Relax now. Relax.

* (Cont'd.)

A. (Continuing) She couldn't take care of the children. I suppose -- I mean, I could have put up with the fights.

THE COURT: All right, you have told us the story of what happened. Don't tell us what you might have --

THE WITNESS: I couldn't leave the apartment, and I had to stay there. I just couldn't walk out and say to hell with everybody else, I'll pay money, here, you take care of the kids. I couldn't. And I had to be around to see what was happening.

I would get calls in the office from the school where my older boy was going that he wasn't dressed, in freezing weather. She would put him on a little light jacket and she wouldn't even dress him at the time.

Q. All right now, Mr. Wolk --

A. There were some times she left --

Q. Mr. Wolk, you say there were periods of time when she left the children?

A. Yes. There were times in November and December of 1971 she went away by herself to Souther America for 13 days. She left the kids with me. I had a housekeeper that was taking care, and she would come in the morning, I would come home at 5:00 o'clock at night to take care of the children. She came back two weeks later, she would leave again, she went down to Puerto Rico for a couple of days.

We would get into an argument, she would just leave. They would call me that she was gone. I'd come home.

I remember once I was with her and my older boy in a restaurant, we got into an argument in the restaurant. She left and she didn't come home for three days. I took my son back to the house, I called the office and I was hoping she would come back. There were times I had to be around, I had to be with the children.

In the meantime, she said that she knew how to take care of the children and what did I know about children.

Q. Now, Mr. Wolk, there came a time when you were separated from your wife?

* (Cont'd.)

A. In February -- no, it was in -- we were going through all the Family Court proceedings, and the lawyers, and they were talking all that time. In July of 1972 I couldn't take it any more. I moved out of the house and I took the children with me and I moved up to Riverdale.

Q. In July and August you were in Family Court also?

A. Yes, afterwards we were in Family Court and then they started to order psychiatric observation of the children, of me.

THE COURT: We don't need all that detail?

Q. Mr. Wolk, who got custody of the children?

A. I received custody of the children.

MR. BATCHELDER: Objection, your Honor.

A. The children have been living with me ever since.

Q. Was there a separation agreement entered into?

A. Yes. A few months later I agreed to pay her more than twice the amount that the Court said --

THE COURT: Please, don't get into all that, Mr. Wolk. When was the separation agreement signed?

THE WITNESS: The separation agreement was signed in September of 1972.

Q. Did you get custody of the children?

A. Yes, I did.

THE COURT: We have had that.

Q. Have you been taking care of the children since then?

A. Yes, I have been taking care of the children since then. There were times -- there are times I had a

* (Cont'd.)

housekeeper in the apartment. There are times I didn't have a housekeeper. They were unsatisfactory, so I would get rid of them, get somebody else, they wouldn't show up. I'd have to take -- if it was during the daytime, a school day, my older boy could go to school and go to somebody else's house in the afternoon. I would take my little son, who is two years old, I would take him to the office, diaper him, do whatever had to be done. There were times I didn't have anybody, I stayed home."

The defendant testified that he always intended to file his tax returns and that he always filed for extensions.*

---

* On pages A39 and 40 of the Appendix the defendant testified on direct examination as follows:

"Q. During this period of time there has been testimony by an employee of the Internal Revenue Service that you filed for extensions?

A. Every year I filed for an extension.

Q. Did you file your tax returns?

A. No, I did not.

Q. Did you intend to file your tax returns?

A. I always intended to file my tax returns. Every time I filed for an extension I intended to file it shortly thereafter if I could ever get myself straightened away."

Again, on page A42, the defendant testified:

"A. Well, among other things, I filed for the extensions, every time I filed for extensions -- every time I filed for an extension I really was hoping that I would be able to get to the work and get my records together. I had no records during that period of time. I didn't even have checks. I didn't have bank statements. I didn't know where the hell anything was. I was just hanging on doing the best I could for whatever I could do at the time.

I then --"

The defendant sought to introduce into evidence written proof that he possessed no bad purpose or evil motive and that he intended to file his income tax returns, but the trial judge refused to permit his separation agreement (marked Defendant's Exhibit "D" for identification) to be introduced into evidence. See The Argument, infra, point C (3).

The government's case consisted mainly of innuendos and inferences. The government improperly attacked defendant on his failure to insert a correct social security number on his 1973, 1974 and 1975 tax returns (see The Argument, infra, point C (1)) and attacked the defendant on his bank deposits which differed from his reported gross income (point C (2)). These matters were irrelevant and prejudicial and should not have been permitted into evidence.

The government also attempted to make capital of the fact that the defendant had received a masters of law with a specialization in taxation in 1959, albeit defendant had never practiced tax law.

The issue never was whether the defendant knew he had to file a tax return. The issue always was whether he "willfully" failed to file his tax returns.

SUMMARY OF ARGUMENT

The defendant did not receive a fair trial. Judges, like everyone else, bring to their work subconscious prejudices. The presiding judge at this trial was no different. Undoubtedly, the presiding judge sought to conduct the trial in an unbiased manner. However, the presiding judge, who had previously served as a president of a Bar Association, was understandably concerned about attorneys charged with violations of law. He did not conceal his personal feelings when he commented at page A70 of the Appendix:

> "I mentioned, Mr. Wolk, really the thing that bothers me is that you are an attorney at law, and I have always felt very strongly that the legal profession are the ones who should really set the example in questions of taxes and that kind of thing, and here you fail to file a tax return for each of four years, and although I am actually sympathetic with your marital problems, it does not seem to me that that answers it at all."

And again at page A71 of the Appendix, he stated:

> "I take a very serious view of this, Mr. Wolk. Having once been a Bar Association president myself, I guess I feel more strongly about these things."

The trial judge's very strong personal convictions (however well-intentioned) permeated the charge and his rulings throughout the trial which, of necessity, were influenced by his deep feelings and deprived the defendant of a fair trial. It is <u>not</u> contended here that the trial judge was consciously prejudiced

against the defendant personally or deliberately sought in any way to deprive the defendant of a fair trial. Nonetheless, both his charge and the rulings on the admissibility of evidence served to deprive the defendant of a fair trial.

To simplify this brief, the argument has been divided into three sections. The first two points deal with the charge. These are as follows:

A. The Court prejudiced the defendant by improperly implying to the jury that only by convicting the defendant could the government collect the tax due.

B. The trial judge did not properly define the meaning of "willfulness" in his charge; moreover, after informing defendant's counsel that he would charge "evil motive or purpose" and then refusing to do so, the trial judge prejudiced defendant's counsel in his summation.

The third point deals with evidentiary matters and has been divided into the following four points:

(1) The social security number.

(2) The bank deposits.

(3) The separation agreement.

(4) Conclusion.

The trial judge permitted the government enormous latitude in the prosecution, erroneously allowing irrelevant and immaterial matters to be introduced into evidence. On the other hand, the trial judge unduly and erroneously restricted the defendant in presenting his defense.

ARGUMENT

A. The Court prejudiced the defendant by improperly implying to the jury that only by convicting the defendant could the government collect the tax due.

Defendant's counsel requested the trial judge to include in his charge appropriate language concerning the distinction between civil and criminal tax liability. Request No. 7 reads as follows:

> "Request No. 7
>
> Distinction Between Civil and Criminal Tax Liability
>
> There is a great distinction between civil tax liability and criminal acts charged in this case.
>
> The defendant is charged with a commission of a crime. The mere fact alone that he may or may not owe taxes does not indicate the commission of a crime.
>
> I wish to emphasize that your verdict in this case, whether it be guilty or not guilty on each count, is not a determination of the civil tax liability of the defendant.
>
> Stated another way, should you find the defendant not guilty, such a verdict does not imply that he is absolved from any further civil tax liability.
>
> United States v. Jack Kane; 1974, EDNY, 73 Cr. 327 (Weinstein, D.J.)"

The trial judge refused to so charge. Instead the trial judge substantially prejudiced the defendant when he stated as follows at pages A54 and 55 of the Appendix:

> "Now, you might ask yourselves, ladies and gentlemen, why did Congress make this a crime? Of course, the answer to that is that our tax system is in the nature of an honor system. We are all supposed to file our tax returns, and we are supposed to pay our taxes. And if somebody doesn't file a tax return so the government cannot collect the tax that might be owed then, he is, in effect, passing that burden on to other people.
>
> So the government has got to collect the money somehow. We all read about that.
>
> Passing a burden on to somebody else, getting out of it themselves, violating what I have called the honor system. And that is the reason the Congress takes a very serious view of this, and the reason why the Congress in this statute makes it a crime to willfully fail to file a tax return." (Emphasis ours.)

The trial judge's charge made it appear that the only way that the defendant would be made responsible for paying his taxes was by the jury's returning a conviction against him on the criminal charges. The jury was never told that the defendant's civil tax liability bore no relationship to the criminal charges. The jury was not told that defendant's civil liability was unaffected by the criminal trial. See United States v. Jack Kane, supra. The trial judge implied, by his failure to mention possible civil penalties, that the only way to require the defendant to pay his taxes was to convict him. It would not be unreasonable for the jurors to believe that the

defendant might escape all tax liability if he were not convicted of a crime.

The trial judge compounded his error by both

(1) refusing to charge the distinction between civil and criminal liability, and

(2) improperly implying that only a criminal conviction would result in the collection of any unpaid tax.

Jurors are laymen, unschooled in the law, and do not necessarily know that the defendant is liable civilly for unpaid taxes. By refusing to clarify the law and, instead, conveying an erroneous impression, the trial judge virtually instructed the jury to convict the defendant.

Moreover, the language of "passing a burden" on to other people was equally prejudicial to defendant. The jurors were, in effect, told that they would have to bear the burden of the defendant's unpaid taxes. This language was highly inflammatory and erroneously tied criminal prosecution of the defendant to collection of tax arrears. Such prejudicial language could only inflame a jury to convict the defendant. The jury had been instructed not to consider the question of punishment. The jurors, all laymen, might have supposed that only a conviction of a crime could insure that the government would be paid its taxes.

B. The trial judge did not properly define the meaning of "willfulness" in his charge; moreover, after informing defendant's counsel that he would charge "evil motive or purpose" and then refusing to do so, the trial judge prejudiced defendant's counsel in summation.

In 1973 the United States Supreme Court in United States v. Bishop, 412 U.S. 346, 93 Sup. Ct. 2008, clarified the law and held that there was no difference between willfulness under the misdemeanor and the felony statutes (Sections 7201 and 7203 of the Internal Revenue Code). At page 361, the Court stated:

> "Until Congress speaks otherwise, we therefore shall continue to require, in both tax felonies and tax misdemeanors that must be done 'willfully', the bad purpose or evil motive described in Murdock, supra."

In United States v. Murdock, 290 U.S. 389, 54 Sup. Ct. 223 (1933) the Supreme Court described, at page 394, "willfulness" as follows:

> "The word often denotes an act which is intentional or knowing, or voluntary, as distinguished from accidental. But when used in a criminal statute it generally means an act done with a bad purpose; without justifiable excuse, subbornly, obstinately, perversely." (Emphasis ours.)

Recently, on October 12, 1976, the Supreme Court in United States v. Pomponio, No. 75-1667, reaffirmed the meaning of "willfulness" as defined in the Bishop case and quoted therefrom

as follows:

> "The Court, in fact, has recognized that the word 'willfully' in these statutes generally connotes a voluntary, intentional violation of a known legal duty. It has formulated the requirement of willfulness as 'bad faith or evil intent.' (United States v.) Murdock (3 USTC Par. 1194), 290 U.S. (389) at 398, or 'evil motive and want of justification in view of all the financial circumstances of the taxpayer.' Spies (v. United States) (43-1 USTC Par. 9243) 317 U.S. (492) at 498, or knowledge that the taxpayer 'should have reported more income than he did.' Sansone (v. United States)(65-1 USTC Par. 9459), 380 U.S. (343) at 353. See James v. United States (61-1 USTC Par. 9449), 366 U.S. 213, 221 (1961); McCarthy v. United States (69-1 USTC Par. 9312), 394 U.S. 459, 471 (1969)." 412 U.S., at 360. (emphasis added)

Although it is not necessary that a trial judge use the precise language described in Murdock, Bishop and Pomponio, it is clear that the Court must necessarily convey to the jury that to convict a defendant they must find that he acted or failed to act with either an evil intent or the bad purpose of violating the law.

Defendant's counsel had requested that the trial judge use the following language in his charge to explain the meaning of the essential element of "willfulness":

> "The word 'wilfully used in connection with the charges here means voluntarily, purposefully, deliberately and intentionally as distinguished from accidentally, inadvertently, or negligently.
>
> Mere negligence, even gross negligence, is not sufficient to constitute wilfulness under the criminal law.
>
> The failure to make a timely return is wilful if

the defendant's failure to act was voluntary and purposeful, and with the intent to fail to do what he knew the law requires to be done; and that the defendant possessed a state of mind which manifested a bad purpose or evil motive to disobey or disregard the law which requires him to file a timely return.

There is no necessity that the Government prove that the defendant had an intention to defraud it, or to evade the payment of any taxes, for the defendant's failure to file to be wilful under this provision of law.

On the other hand, the defendant's conduct is not wilful if you find that he failed to file a return because of negligence, inadvertence, accident or reckless disregard for the requirements of the law."

At page 287 of the Transcript, the trial judge, in a conversation with the prosecuting attorney and the defendant's attorney, out of the presence of the jury, made the following statement with respect to "willfulness":

"THE COURT: Well, I think what I usually charge on this, and the furthest I ever go, is that I tell them what a willful act is, I tell them what a willful and unlawful act is. Have you got the charge book, Mr. Clerk?

An act is done knowingly and willfully if it is done voluntarily, and unlawfully if it is done with an evil motive or purpose, which I would add, such as to fail to file income tax returns or something like that. That's about the most I will go on it." (Emphasis ours.)

Nevertheless, when the time came to actually charge as to the meaning of "willfulness," the trial judge inexplicably changed his mind and instead gave the following insufficient charge (at page A59 of the Appendix):

"In other words, did the defendant have criminal intent, willfully, to fail to file the return.

> How do you determine that, ladies and gentlemen? Well, of course an act, or really this is a failure to act, if you don't file a return you are failing to act, I suppose, but an act or failure to act is done knowingly and willfully if it is done voluntarily and purposefully. An act, or, again, a failure to act, is done willfully, knowingly and unlawfully if it is a voluntary and intentional violation of a known legal duty.
>
> Well, here if the defendant knew he was required to file a tax return by April 15th of the year in question and intentionally failed to do so, then he would have willfully failed to file a tax return under the statute which I reviewed with you.
>
> On the other hand, ladies and gentlemen, an act is not done willfully or knowingly or unlawfully if it is done by mistake, if it is done by carelessness or if it is done by other innocent reason."

A jury should not be furnished an ambiguous charge which prejudices a defendant's right to a fair trial. The trial judge did not charge that the defendant's willfulness must be with the bad purpose to violate Section 7203 of the Internal Revenue Code. The trial judge did not charge "bad purpose or evil motive."

There is a distinction between civil tax liabil[illegible] arising out of a failure to file and criminal willfulness. Obviously, to be guilty of a criminal act a defendant must have intended, with a bad purpose, to violate the statute. The defendant was entitled to a charge which would clearly indicate to the jury that they must find that the defendant willfully (with either a bad purpose or evil motive) failed to file his income

tax returns intending to violate Section 7203 of the Internal Revenue Code.

The defendant had conceded that he was negligent, but insisted that he had no bad purpose or evil motive and that he always intended to file. (see pages A40 and 42 of the Appendix.) As proof of no evil motive or bad purpose, the defendant submitted evidence that he had always filed for extensions (see pages A40 and 42 of the Appendix). The defendant also sought to introduce affirmative proof that he always intended to file but was prevented from doing so by the Court. See Point C(3), supra, regarding the separation agreement.

The trial judge's charge was deficient and very prejudicial in that it did not use either the phrase "bad purpose" or "evil motive." The trial judge failed to explain to the jury that a non-filing due to "negligence" was not a crime as it did not constitute "willfulness."

The charge used the word "purposefully," without the adequate explanation that in a non-filing criminal case it means "bad purpose." Certainly a jury is entitled to know that the purpose had to be a "bad" purpose, and not merely that the defendant knew he was supposed to file and did not do so. The trial judge's language was too broad, unclear and ambiguous.

In addition, the trial judge carved and diluted away at what did not constitute "willfulness" when he used only "carelessness." The trial judge refused to charge that "negligence" did not constitute "willfulness."

The trial judge's insufficient charge was particularly prejudicial to defendant when he himself had previously stated that he intended to use the phrase "evil motive or purpose." His subsequent failure to so charge left defendant's counsel in an impossible situation since he had already made his summation to the jury. Fairness to the defendant would have dictated that the trial judge should have informed defendant's counsel before summation that he did not intend to charge "evil motive or purpose," as he had previously stated he would.

It is respectfully submitted that not only was the charge insufficient as a matter of law, but was compounded when the trial judge refused to charge "evil motive or purpose," as he had stated he would do. This so prejudiced the defendant and the defendant's counsel's summation that in the interest of justice the conviction should be reversed.

C. The trial judge improperly permitted the government to introduce into evidence irrelevant and immaterial evidence, thereby depriving the defendant of a fair trial. On the other hand, the defendant was prevented from introducing written instruments into evidence to sustain his defense.

(1) The Social Security Number.

Special agents from the Internal Revenue Service contacted the defendant in August, 1973. While the special agents were conducting their investigation, the defendant timely filed his income tax return for the calendar year 1973 prior to April 15, 1974.

At the trial, the first government witness, Alexander DeGennaro, a tax examiner from the Internal Revenue Service at Brookhaven Service Center, Holtsville, New York, testified that the government records did not reveal that tax returns had been filed for the calendar years 1969, 1970, 1971 and 1972. He further testified that the defendant's social security number used on tax returns prior to 1969 was 131-24-9146.

On direct examination, Mr. DeGennaro was then asked whether he reviewed the filed tax return for the year 1973. Defendant's counsel objected. The Court permitted Mr. DeGennaro to testify (see pages A5-11 of the Appendix) that the 1973, 1974 and 1975 tax returns (all filed after the investigation had commenced) had indicated a different social

security number, to wit, 131-96-9364. The introduction of this evidence was highly prejudicial to the defendant. It was immaterial and irrelevant since the defendant's tax returns for 1973, 1974 and 1975 were filed after the investigation had commenced. This "fact" therefore, could not, under any circumstances, be relevant to the issue of willfulness." Nevertheless, the trial judge permitted the government to introduce this evidence.

When the defendant voluntarily testified in his own behalf, he was obviously compelled to explain why the number set forth on the 1973, 1974 and 1975 returns differed from his social security number (see pages A30-33 of the Appendix). The defendant sought to introduce into evidence a package of forms that had been sent to him by the Internal Revenue Service at his office address bearing that specific number (131-96-9364) which the defendant had inserted on his 1973, 1974 and 1975 tax returns, believing the number to be his social security number. The trial judge refused to permit the package of forms bearing the number 131-96-9364 to be introduced into evidence to clearly explain the error. The trial judge permitted the defendant to explain (on page A32) where the number which appeared on the 1973, 1974 and 1975 tax returns had come from, but steadfastly refused to permit the supporting data (defendant's Exhibit "B" for identification)

to be introduced into evidence.

The entire subject of the incorrect social security number should never have been allowed into evidence in the first place. Once improperly allowed in evidence, the trial judge refused to permit the defendant to submit documentary evidence to clarify the matter. Even though the defendant testified, the government would not let this false "issue" die. On cross-examination (at pages A-45-46 of the Appendix) the prosecuting attorney attached great significance to this completely irrelevant and innocent error. Once he had been permitted by the trial judge to raise this false "issue," the prosecuting attorney again (on page A47 of the Appendix) raised the subject when he stated:

> "That's not what he's being charged with here. And if he had any doubts about whether he would get away, I submit to you, ladies and gentlemen, that applying your common sense to April 15th as you make out your tax returns, if you can say with a straight face that you did not know that your Social Security number was to go in the upper right-hand corner as your taxpayer identification number, and that you don't know your Social Security number as you sit in this box, I say there is a little piece of paper that a fair number of us carry, and I submit to you also that we use our Social Security number more than we would like to say we do."

Once raised, this irrelevant "issue" mushroomed into a Kafka-like significance, constantly being used by the prosecuting attorney as additional "proof" that the defendant

"willfully" failed to file his returns and was guilty as charged. This irrelevant matter became a major issue at the trial. The trial judge's original error (in permitting this irrelevant and false "issue" to be raised in the first instance) was compounded by his failure to permit the defendant to document his explanation. The entire non-relevant "issue" was permitted to snowball to such an extent that, of necessity, it must be assumed that it played a substantial part in the jury's verdict.

(2) The Bank Deposits.

On direct examination the government introduced into evidence, over objection, the defendant's bank statements (Exhibits 26 to 29 and 33) for the years 1969, 1970, 1971 and 1972 (see pages A13-19 and 20 of the Appendix). Despite the fact that the government had already introduced sufficient evidence to establish that the defendant had earned in excess of $1200 for the calendar years 1969, 1970, 1971 and 1972, the introduction into evidence of these bank statements, without any proof as to whether the deposits therein constituted income, was highly prejudicial. As defendant's counsel had argued on page A14 of the Appendix:

> "MR. TODEL: If the Court pleases, these are statements of an account that Mr. Wolk had at the Manufacturers Hanover Bank. I don't understand the purpose of this other than it is a highly prejudicial type of introduction merely showing certain deposits in there.
>
> In the practice of law many deposits are made which are not actually income, and ---"

The trial judge overruled defendant's counsel's objection.

In addition, the trial Court permitted the government to introduce into evidence Exhibit 35, a large chart indicating the amount of the bank deposits for the years 1969, 1970, 1971 and 1972. This self-serving chart remained in full view of the jury throughout the trial.

The introduction of both the bank statements and the chart were highly prejudicial to the defendant. The jurors were constantly reminded that the defendant had made substantial deposits into these accounts. Certainly the bank statements themselves did not show that the defendant had earned money. There was no proof that all of the deposits in the bank accounts were income. The government never contended that the deposits were income. On the contrary, there was substantial proof later at the trial that the defendant used the account for all sorts of deposits, i.e., loans, wash transactions, etc. However, the mere magnitude of these deposits were designed to prejudice the jurors against the defendant.

On cross-examination, the prosecuting attorney spent a substantial amount of time trying to "imply" that the bank deposits constituted income. In effect, the prosecution was trying to "imply" defendant was guilty of "willful evasion." The defendant was not so charged with this crime. The bank deposits had nothing to do with the issues in the case. They were irrelevant and their introduction into evidence was highly prejudicial to the defendant.

The information in this case charges the defendant with having willfully failed to report gross income in the sum of $37,620 for 1969, $44,578 for 1970, $69,542.53 for

[Pages 30 and 31 have been inverted]

1971 and $63,512.27 for 1972. These were the sums indicated by the defendant on his tax returns (Exhibits 36 to 39).

On summation, the prosecuting attorney did not even refer to the difference between the bank deposits and the tax returns. However, he had planted the seed in the jury's mind during his cross-examination. And he was successful!

When the jury retired after the charge, the jury specifically asked for copies of the tax returns and the bank statements (see page A69 of the Appendix). These were the only exhibits requested by the jury. Clearly, the jury believed that the discrepancy between the bank deposits and the gross income set forth on the defendant's tax returns was significant. Why else would they have asked to see the bank statements? The bank statements should never have been allowed into evidence in the first place. The trial judge erred by allowing them into evidence. The jury clearly relied upon them to the defendant's prejudice and the trial judge never cautioned the jury in his charge that the deposits set forth in the bank statements were not proof of income. Ordinary fairness dictated such an affirmative act by the judge!

(3) The Separation Agreement.

At the trial, Harvey I. Sladkus, an attorney-at-law who represented the defendant in his matrimonial difficulties, was called as a witness by the defendant. The defendant attempted to introduce into evidence a separation agreement (marked defendant's Exhibit "D" for identification). The separation agreement was dated in 1972 (prior to the time that the special agents had commenced their investigation of the defendant). Defendant's counsel sought to establish that the separation agreement contained a clause which obligated defendant's wife to sign tax returns for the years not previously filed.

The executed and filed separation agreement was offered into evidence to affirmatively establish that the defendant did not intend to purposely violate the law; on the contrary, the separation agreement would show that defendant intended to file his income tax returns. The separation agreement would negate either a bad purpose or an evil motive, to purposely violate the law, as defined by the Supreme Court.

The trial judge refused to permit the separation agreement to be marked into evidence (see pages A21-29 of the Appendix), nor to permit Mr. Sladkus to testify about the contents of the separation agreement, which would corroborate the defendant's contention that he always had intended to file his past due tax returns.

Furthermore, when the defendant attempted to testify with respect to the separation agreement, the trial judge refused to permit him to so testify and refused to permit defendant's counsel to ask any further questions regarding this matter (see page A43 of the Appendix).

The separation agreement, executed in 1972, and thereafter filed in the office of the County Clerk, clearly was relevant to the issue in the case as to whether the defendant willfully intended to violate Section 7203 of the Internal Revenue Code and whether the defendant possessed a bad purpose or evil motive, as defined in the Murdock, Bishop and Pomponio cases, supra. The trial judge's refusal to permit the separation agreement or testimony relative thereto into evidence greatly prejudiced the defendant.

(4) Conclusion.

The trial judge permitted the government enormous latitude in the prosecution, erroneously allowing irrelevant and immaterial matters to be introduced into evidence. On the other hand, the trial judge unduly and erroneously restricted the defendant in presenting his case to negate "willfulness" by establishing that he had neither a bad purpose or evil motive in failing to file his tax returns and that he never intended to violate Section 7203 of the Internal Revenue Code.

CONCLUSION

The judgment of conviction should be set aside and the information dismissed or, in the alternative, the case remanded for a new trial.

Respectfully submitted,

EDMUND WOLK
Defendant, Pro Se
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25 West 43rd Street
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STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

SCOTT ALVINO, being duly sworn, deposes and says that deponent is not a party to the action, is over 18 years of age and resides at 5701 15th Ave BROOKLYN, N.Y.

That on the 8 day of DECEMBER, 1976, deponent personally served the within APPELLANT'S BRIEF upon the attorneys designated below who represent the indicated parties in this action and at the addresses below stated which are those that have been designated by said attorneys for that purpose.

By leaving 2 true copies of same with a duly authorized person at their designated office.

~~By depositing ____ true copies of same enclosed in a postpaid properly addressed wrapper, in the post office or official depository under the exclusive care and custody of the United Stated post office department within the State of New York.~~

Names of attorneys served, together with the names of the clients represented and the attorneys' designated addresses.

ROBERT B. FISKE, JR.
UNITED STATES ATTORNEY
ATTORNEY FOR PLAINTIFF-APPELLEE
ONE ST. ANDREWS PLAZA
NEW YORK, N.Y. 10007

Scott Alvino

Sworn to before me this
8 day of December, 1976

Michael DeSantis

MICHAEL DeSANTIS
Notary Public, State of New York
No. 03-0930908
Qualified in Bronx County
Commission Expires March 30, 1977